In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-530

UNITED STATES OF AMERICA,
Petitioner,

vs.

ASHLAND OIL, INC., ET AL.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions delivered in the courts below (App. B, 3a, and App. D. 64a) are reported in 554 F.2d 381 (10th Cir.), and in 364 F.Supp. 6 (N.D. Okla.). An earlier opinion by a panel of the Court of Appeals (App. C, 44a) was withdrawn on grant of rehearing en banc, and was not published.

QUESTIONS PRESENTED

1. Should this Court review the determination made in *Northern Natural Gas Company* v. *Grounds*, 441 F.2d 704 (10th Cir.), that gas producers supplying helium to natural gas pipeline helium extractors are entitled to payment of a reasonable value for their helium, when the same argument made by petitioner was fully presented in that case, when it was presented both by the helium extractors and the United States in connection with petitions for certiorari which were denied by this Court in January, 1972; when, since then, another panel of the court of appeals and the entire court of appeals, sitting *en banc*, have separately considered and again rejected the same argument, without dissent on this issue; and when that determination is demonstrably correct?

2. Did the court of appeals properly approve a valuation for helium in natural gas based upon competitive market value of extracted helium, less extraction costs, when both federal and state law require that valuation method to be applied, under the evidence and under the district court's factual findings?

STATUTES INVOLVED

Subsections (a), (b), and (c) of Section 4 of the Natural Gas Act, 52 Stat. 82, 76 Stat. 72, 15 U.S.C. Sec. 717c; and Section 11 of the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. Sec. 167i, are reprinted in the Appendix to this brief, *infra*.

STATEMENT

We have stated the genesis and progress of this litigation in our Brief in Opposition to the Petition for Writ of Certiorari filed by Phillips Petroleum Company, in No. 77-221 (certiorari denied, October 31, 1977), and will not repeat that factual statement.

However, the Petition filed by the United States fails to state material facts supporting the judgment of the court of appeals, and relies largely on unfounded assumptions which distort the true reasons which compelled the judgment below. We shall therefore refer to documented facts necessary to view the case in true perspective.

Prior to 1960, the United States had built several helium extraction plants, and was the sole commercial extractor marketing helium. (554 F.2d at 386). During the 1950's, coincident with the technological explosion in science and industry, demand for helium rose spectacularly for numerous indispensable uses. It became clearly foreseeable that demand would continue to increase during the very time that existing reserves of helium contained in natural gas were being depleted, with the result that depleting gas reservoirs would not be able to supply helium required for these necessary uses.[1]

By 1958, the United States Department of Interior had completed comprehensive studies demonstrating that helium from the Hugoton-Panhandle fields would be required for governmental and commercial needs. (R. Ex.

1. As early as 1958-1959, private industrial concerns conceived preliminary plans for building private helium plants to extract helium from natural gas being produced from the Hugoton-Panhandle fields which contained the principal remaining reserves in the free world. (*Grounds*. R. Vol. III, 1011,1017).

Vol III, 556).[2] Unless the helium were extracted before the natural gas was consumed for fuel purposes, it would be irretrievably lost. In the latter event, helium demand could only be supplied from a few isolated presently non-commercial sources at production costs up to $350.00 per m.c.f. of helium, with the remainder obtainable only from the trace of helium in the atmosphere at a cost then estimated to be $10,000.00 per m.c.f. (R. Ex. Vol. VI, 1131, R. Ex. Vol. II, 296).

Thus, the Department of Interior proposed to Congress that amendments be made to the existing Helium Act, to enable the United States to extract helium from the existing inexpensive sources for future sale and use. From extensive committee hearings on the proposed amendments, Congress was fully aware that the natural gas containing the helium was regulated as to rates and transportation pursuant to the Natural Gas Act. The language of Section 11 of the Helium Act Amendments, in excluding helium from the Natural Gas Act, was carefully worked out by the Senate committee together with the Federal Power Commission. (R. Ex. Vol. V, 919). The legislative history proves beyond question that the statute says exactly what was intended—that the provisions of the Natural Gas Act are not applicable to the sale of helium "either prior to or subsequent to" the extraction of the helium. (441 F.2d at 718). The necessary consequence was to make clear that Federal Power Commission rates allowed for natural gas constituted payment *only* for the jurisdictional natural gas, and could not legally be considered a payment for the unregulated, nonjurisdictional helium.

2. Citations designated "R." will be to the ten volumes of the printed Appendix in the Court of Appeals.

In the House subcommittee hearings, Section 1 of the proposed amendments (ultimately §3), providing for helium acquisition, and eminent domain powers, was subjected to intense scrutiny. As proposed by the Interior Department, that section would have made no mention of any payment for the value of helium as a commodity.[3] Congressman Rogers, Chairman of the Subcommittee on Mining, however, presented a revised version on this point which was ultimately enacted.[4] The enacted revision provided that if the helium could not be obtained by contract for "market value", that it should be obtained by condemnation, "the just compensation for such condemnation to be measured by terms and prices determined to be *commensurate* with the fair market value. . . ." 50 U.S.C. 167a(a)(2). (Our emphasis).

The foregoing version was approved after Congressman Rogers, in an interchange concerning market value with Undersecretary Bennett, made clear that the helium value was to inure to the benefit of those having interests in the helium, back to the initial interest holders, the royalty owners from whose lands the helium was produced with the natural gas. (R. Ex. Vol. IV, p. 827). It was enacted despite express objections of the Interior Department. (R. Ex. Vol. IV, 829).

It was also developed in subcommittee hearings that "there is no such thing as a true competitive market for helium" (R. Ex. Vol. V, p. 867), and thus there was no market price except the arbitrary price set by the government under its then existing monopoly. The only suggestion made as to the means for determining, in a condemnation action, a value "commensurate with a fair market

3. R. Ex. Vol. IV, 703, 725, 817, 829.

4. R. Ex. Vol. IV, 711-719, 821.

value" was to consider the value of helium extracted by industry and sold in a competitive market, in connection with the costs incurred in its extraction. (Hearings Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960). Indeed, the Department of Interior was well aware that the government, when earlier called upon to account for the wellhead value of helium, had used the so-called value-less-expense, or "workback" method, which it described as an established principle in the gas industry. (R. Ex. Vol. II, p. 298). The wellhead price for commingled helium so calculated was thereafter used in several instances as a basis for helium payment by the government in obtaining supplies for its helium plants. (R. Vol. III, 634-635).

In light of these facts, the price provisions of the helium conservation contracts entered into in 1961 between the government and the helium extracting companies (such as Phillips Petroleum Company) become most significant For, as noted by the court of appeals (554 F.2d at 384, 389), the base prices in the contracts were negotiated specially without any relationship to market value, leaving open the ultimate price to be paid when the amount owing to third parties supplying the helium (such as Ashland Oil, Inc.) was ultimately determined. The manner in which the helium extractors and the government were to share such payments to helium suppliers insured that the government ultimately would pay an amount commensurate with a competitively established fair market value. Phillips was obligated to pay third parties only $3.00 per m.c.f. out of its base price proceeds, and the government would pay an additional price for the balance awarded the helium suppliers. (R. Vol. I, 91-95). However, in return for that limitation of liability, the helium extractors (including Phillips) agreed that they and their

affiliates would not receive any additional payments for helium which they themselves produced and supplied. Phillips Petroleum Company, for example, produced 50% of all the helium to be extracted by it. Thus, any payment to third-party suppliers based on the work-back method would result, on the average, in the government obtaining the helium at a price "commensurate with" competitively established market values for extracted, marketable helium.

The decision by the court of appeals in this case recognized the obvious fact that in the 1960's a competitive market value in a free market was established for helium sold as a commodity for beneficial use. But there did not exist any market value for commingled helium at the wellhead, because the helium was commingled in jurisdictional natural gas which gas producers were required by FPC regulation to continue supplying at an FPC rate applicable only to the natural gas. As noted by the Court, 554 F.2d 386:

> ". . . There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream."

The decision by the court, sitting *en banc*, therefore, approved the use of the work-back method of valuation for the commingled helium, noting the established industry and government practice, as well as the federal and state decisions which commonly utilize this method for valuing one component of a gas stream. Since extracted helium had a known fair market value established competitively in a free marketplace, the value of the helium prior to extraction obviously had that value, less the economic contribution made by the extractor. The extractor is paid

for his contribution by a return of all costs, and a fair profit, or rate of return. The balance represents the value of commingled, unextracted helium.

The valuation method, thus, is not only simple, but is accurate in being directly derived from the known market value of the commodity at a point close in space and time.[5]

Moreover, the decision below effectuates the intent of Congress that those having interests in the helium be paid commensurate with fair market value. Producers recovering the reasonable value for their helium pay an appropriate royalty to the landowners from whose lands the helium is produced.

Upon further depletion of the present reserves, the helium acquired by the government will be purified and sold so as to recover all acquisition and storage costs, including interest, at no ultimate cost to the taxpayers. (R. Vol. III, 650). At the same time, the purpose of the stockpiling program in making this helium available for indispensable uses in government and industry, will have been accomplished.

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5. One minute elapses from the entry of commingled helium into the extraction plant until its completed extraction.

ARGUMENT

Northern Natural Gas Company v. *Grounds*, 441 F.2d 704 was decided based upon a massive record, after extensive briefing and extended oral argument. The court of appeals denied petitions for rehearing *en banc*, and this Court denied certiorari, 404 U.S. 1063, after considering the same argument now made again by the United States. The court of appeals, sitting *en banc* on rehearing below, correctly rejected the same argument now made, in applying the holding in *Grounds* that Ashland Oil, Inc. and its royalty owners were entitled to recover the reasonable value of their helium. The present petition by the United States fails to consider historical facts which require this conclusion; fails to deal with the reality that producers were unable to negotiate for or obtain any payment for helium short of judicial decree; and fails to state what Section 11 of the Helium Act means, if it does not mean what it expressly provides.

The valuation method applied by the district court, and approved by the court of appeals, is an established method in the industry and is used by the government itself, in determining the value of one component contained in a gas stream. The method is regularly applied by both federal and state courts, and is recognized as appropriate by oil and gas scholars. It removes the question of value from speculation, and ties it to the known value of the commodity after extraction. Application of this method merely requires the government ultimately to pay a price "commensurate with the fair market value" as required by law. The government did not create that value, but rather obtained helium as a commercial commodity for a known market, in which it will recover all its costs.

I. The Petition Presents Unsound and Inadequate Reasons for Review of the Grounds Decision, in Which This Court Denied Certiorari Six Years Ago.

Before discussing the basic fallacy inherent in the Petition of the United States, which seeks review of the *Grounds* decision, followed herein by the court of appeals, *en banc*, several practical principles of jurisprudence, such as finality, judicial economy and avoidance of delay, should be considered.

The interpleader suits in *Grounds* (441 F.2d 704) were filed in Kansas in 1963. Upon a massive record containing a complete legislative history of the Helium Act Amendments of 1960, and containing complete and detailed facts relating to the factual and legal impact of FPC rate regulation of natural gas upon the price provisions of natural gas contracts, the *Grounds* decision held, in 1971, that producers supplying helium for extraction had received no payment for it.

After denial of motions for rehearing *en banc*, this Court denied certiorari in January, 1972, considering as insufficient the very reasons now advanced, which had been formally presented by the United States in support of the helium extractors' similar arguments. [404 U.S. 1063 (1972)]. Since January, 1972, the *Grounds* case has been relied upon in protracted proceedings at the trial and appellate levels. In the instant case another panel of the court of appeals, and later the *en banc* six-judge panel, have separately considered and denied the same arguments opposing liability, without a single dissent on this issue.

In the meantime, those who long ago were held entitled to recover a value for their helium are deprived of it at an obsolete rate of interest; while every year royalty

owners and others grow old or die without receiving the value due them. It is, therefore, less than comforting, though true, to see that the United States concedes that a review of the holding in *Grounds*, even if it resulted in reversal, would simply require a remand for a determination on other theories of recovery not heretofore ruled upon—other causes which, if sustained, would result in more petitions to this Court. (Petition, p. 22).

Whatever the finespun technicalities, we suggest the *Grounds* decision should be accorded finality at this time. We proceed, however, to answer again the arguments made by the United States.

The most patent error in petitioner's argument stems from its inability to explain away the clear meaning of Section 11 of the Helium Act Amendments. Section 11 states that the Natural Gas Act does not apply "to the sale . . . of helium . . . prior to . . . the separation of such helium from the natural gas. . . ." Senate Report No. 1814 stated that its purpose was to make "clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself."

As stated in *Grounds*, 441 F.2d at 721:

> "In our opinion this means what it says and, if the Natural Gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium."

The inevitable result is that an FPC service rate which becomes effective under the Natural Gas Act does not, and legally cannot, be considered a payment for nonjurisdictional helium. It is a payment only for jurisdictional natural gas. From the leading case of *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566 (1921), to

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), to the present time, the invariable rule of federal rate regulation is that the regulated or filed rate must be paid for the jurisdictional commodity or service, neither more nor less, regardless of the assent or dissent of the parties.

Indeed, Ashland Oil itself felt the full force of the filed rate doctrine as an outgrowth of this very case. For the FPC ruled that Ashland could not collect from Phillips over one-half million dollars in deficiencies below the contract price because Ashland had not timely filed for the increases under the Natural Gas Act. The FPC decision[6] stated:

> "Our conclusion is consistent with the filed rate doctrine under which the effective rate on file with the Commission is the only rate that may be charged or collected for the sale of natural gas in interstate commerce. . . . (citing cases)".

The *Grounds* decision recognized the same necessary conclusion in holding that the "filed rate, is the lawful rate and there may be no deviation therefrom. . ." (441 F.2d at 720).

Since the filed, lawful rate for natural gas supersedes any contract price at variance, it follows that an FPC rate constitutes payment only for jurisdictional natural gas, and cannot constitute any payment for unregulated helium. Otherwise an unlawful deviation would occur in violation of the express statutory provisions.

This is also the reason the FPC recognized in *Phillips Petroleum Company* v. *Ashland Oil & Refining Co.*, 40 F.P.C. 390, after referring to this case pending in the district court; ". . . the Commission has no jurisdiction over the price of helium."

6. *Phillips Petroleum Company* v. *Ashland Oil & Refining Co.*, 40 F.P.C. 390, affirmed in 421 F.2d 17 (6th Cir. 1970).

Having established that FPC rates do not and cannot be considered payment for unregulated helium, what result must follow? In no instance is there an express contract covering sale of helium as a separate commodity. And the only contract applicable to the composite gas stream has been superseded as to price by FPC rates, which cannot cover helium.

In *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), this Court had no difficulty in recognizing why the *Grounds* decision required the helium extractors to pay reasonable value for the helium supplied to them. Since payment of any price "at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent", such payment cannot be asserted as a defense in a quasi-contractual suit, or an action in *quantum meruit*, having its source in state law. (415 U.S. at 126, 128, 129).

Quantum meruit refers to that class of obligations "Imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter* v. *Josey Oil Co.*, 26 F.2d 442 (8th Cir.).

In other words, since federal law requires that an FPC rate for natural gas cannot be a payment for helium, the common law concept of *quantum meruit* requires payment for delivery of a commodity of value, as to which no payment has yet been made.

The petitioner is silent concerning this Court's logical analysis of *Grounds*. Petitioner, instead, states that

Grounds holds that the payment for helium is required by "federal regulatory policy". As we have seen, payment is required by the principle of *quantum meruit* under state law, simply because the payment of natural gas under federal law was only for natural gas, not helium.

Grounds did refer to Section 4(b) of the Natural Gas Act, 15 U.S.C. Sec. 717c(b) as forbidding "any undue preference or advantage" to any person. 441 F.2d at 720. But it did so only in connection with the proposition that FPC rates for natural gas could not be payments for non-jurisdictional helium. Otherwise an unlawful deviation would exist.

Only if the state common law of quasi-contract and *quantum meruit* were unavailable as a remedy, would it be necessary to reach the question of whether federal law itself should imply a cause of action requiring payment for helium, in order to prevent unlawful deviation from federal natural gas rates, or to prevent "any undue preference or advantage" to any person. Obviously, if state law requires the payment, there is no necessity to consider whether a federal cause of action must be implied from the statutory provisions in order to prevent unlawful deviation, undue preference or advantage. Cf., *Cort* v. *Ash*, 422 U.S. 66, 78, 84 (1975).

Petitioner, thus, has confused the issue. The federal statutes require that the payment of FPC rates not be considered any payment for helium, as the FPC itself recognizes. State law requires payment of the reasonable value of the unregulated helium, for which no payment has been made.

Petitioner's strained, circuitous effort to circumvent these established principles, based upon erroneous assumptions which are contrary to the Record, must be rejected, as they have been repeatedly below.

The second basic error found in the Petition is the assertion that if the Federal Power Commission had no jurisdiction over the price of helium "what follows is that the parties were free to negotiate whatever price they desired for the helium content. . . ." (p. 17). This statement is contrary to a mass of undisputed evidence, and is devoid of logic or reason.

Virtually all the helium-bearing natural gas involved was contracted for and sold interstate prior to 1954, when it was required to be regulated by the FPC, *Phillips Petroleum* v. *Wisconsin*, 347 U.S. 672. As noted in *Grounds*, these contracts commonly provided for periodic price escalation, arbitration, or renegotiation. (441 F.2d at 722). A typical provision, contained in a 1948 Ashland Oil contract, provided for a single price per m.c.f. on the mixed stream, and did not permit a separate value to be ascribed to helium. As a result, the purchaser, Cities Service, insisted on fixing a single price, making it impossible for Ashland to obtain a separate, unregulated price for the helium content.[7]

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7. Petitioner misinterprets that periodic price arbitration, and the effect of FPC regulation on it, in footnote 26, p. 19 of the Petition. Petitioner says that example "does not demonstrate that the Federal Power Commission refused to permit a seller compensation for its helium, since the helium issue was not presented to the Commission. But even if it did, it would only demonstrate that under the Court's holding in *Grounds*, the Commission's action was erroneous and could have been corrected on review. . . ."

The whole point of the *Grounds* holding was that the FPC had *no jurisdiction* of any price for helium, so that it could take no action whatsoever one way or the other on it. It was not the FPC which refused, or did not refuse, to permit helium compensation. The FPC had no jurisdiction on that point. What deprived Ashland of any means of obtaining a value for helium as an unregulated commodity was the frustration of contract prices by the imposition of rate regulation on the natural gas, but not on the separate commodity, helium.

The simple economic fact of life was, and is, that as long as the helium extractors had the federal right, under FPC regulation, to require continued deliveries of the natural gas, they could ignore the helium suppliers with total impunity, so far as helium was concerned.

As the *en banc* decision below reiterated:

> ". . . . There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases." (554 F.2d at 386).

The elementary fact, ignored by petitioner, is that the contracts, and the periodic price escalation and renegotiation provisions, were entered into upon the premise that the seller should receive, and the purchaser pay, current market values at the times of delivery as established *in a free competitive market, for all elements of the gas stream.* Thus, there was no occasion, in pricing, to segregate various gaseous elements in the stream. But when, thereafter, natural gas was regulated, but helium contained in the stream was not, the gas purchasers found themselves in the apparently advantageous position of paying a regulated rate for the natural gas only, but being able to receive, for nothing, the commingled unregulated helium.

As held in *Grounds,* the contract prices were superseded by FPC approved rates—and FPC rates were jurisdictionally and legally a payment only for jurisdictional natural gas. Although the United States repeats conclusions concerning freedom to negotiate for a helium price, it nowhere points out any practical, actual manner in which this can be accomplished. No evidence exists, or is referred to by the United States, which in any way detracts from the considered judgment in *Grounds* that, "The regulated lessee-producers must continue to sell the dedicated gas

and have no statutory or contractual method of obtaining any benefit for the increased value." (441 F.2d at 722).

In light of the foregoing, the assertion that, "With one possible exception, no producer in those cases [*Grounds*] has been impeded by the Commission in any effort to negotiate separately with respect to helium" (Petition, p. 20), becomes meaningless and absurd. From July, 1963, when the *Grounds* cases were filed, the helium extractors took the position that, having paid FPC rates for natural gas, they did, and would, *refuse* to pay for helium, regardless of contract provisions for renegotiation or escalation, and regardless of the fact that helium had become a separate commodity of value not included in FPC rates for natural gas. In point of fact, Ashland's aborted attempt to obtain an arbitrated value for unregulated helium, while that litigation was in progress, was an exercise in futility which could only demonstrate, in the pending litigation,[8] the truth of what was already obvious; that there was a total absence of freedom to negotiate or obtain a value for helium itself.

In a similar manner, Ashland's escalation of contract prices to Phillips has been directly limited by FPC regulation of Phillips' own resale prices, and Ashland's proceeds have been limited to FPC rates filed, regardless of contract price.[9]

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8. In footnote 27, p. 20, petitioner refers to some gas contracts mentioning helium, as support for its contention that free negotiation could occur. Unfortunately, as noted by the Court of Appeals, these were recent contracts involving gas which contained no helium. This "meaningless gesture of the parties" has no evidentiary value. (554 F.2d at 386).

9. Other types of contract frustration by FPC regulation occur when a term contract expires, but deliveries must continue so that unilateral rates may be filed; when an FPC rate settlement is made and a contract amended to conform thereto for filing purposes; and when a contract price is lower than the FPC *minimum* rate for natural gas, to name a few.

But, in demonstrating the nearly universal frustration of gas contract price provisions by FPC rate regulation, we must not overlook the truth that Congress has specified that FPC rates cannot constitute a payment for commingled helium. Any contract filed results in an FPC service rate, whether the contract price is modified or not. There is no longer a contract price, but a regulated rate for natural gas only. Thus, gas producers delivering helium and receiving only FPC rates for natural gas, have a *quantum meruit* right to recover for the reasonable value of the unregulated commodity which is extracted for the commercial market. The relevancy of demonstrating actual frustration of contract prices is simply to support the good reasons Congress had to enact the law as it did, and to demonstrate the inherent injustice of allowing those who obtain the helium now, and who will use it in the future, to obtain enormous economic benefit from it, with no compensation to those who have initially owned it and supplied it to this nation.[10]

II. The Court of Appeals Correctly Approved the Commonly Used Method for Valuing One Component of a Gas Stream Which Is Extracted for Beneficial Use.

Petitioner asserts that federal law should be applied to the question of helium valuation, as it is in condemnation cases. Yet the petition is notably silent in stating the substance of that law. It relies solely on a single dissent from the six-judge *en banc* decision. The dissent, in turn, cites no authority whatsoever applicable to the

10. The Petition refers to helium, when not extracted, as being worthless because it is wasted. The Record conclusively establishes that helium *extracted for beneficial use* had values ranging from $20.00 to $35.00 per m.c.f. during the period in question.

facts of this case.[11] In the factual situations presented, both federal and state decisions have uniformly approved the valuation method adopted by the district court and approved, with modification, on appeal. (554 F.2d 385-388).

The necessity of using a "workback" method of valuation can be illustrated by the common practice of the industry concerning extraction of natural gas liquids from natural gas. The gas stream is normally composed of different types of gases which can be extracted as liquids, such as natural gasoline, butane and propane. The majority of the stream is methane. The gas stream also contains nitrogen, and, in the Hugoton area, helium.

Many gas producers make arrangements with extraction plant operators to build extraction plants in order

11. Judge Doyle had earlier concurred in the panel decision approving the valuation method. On rehearing *en banc*, he dissented, apparently because of a mistaken view of the impact upon the government, and a failure to recognize the commercial nature of the helium stockpiling program.

The district court in Kansas (on remand by the Court of Appeals in *Grounds*), erroneously rejected the workback method without discussion of the governing cases, stating merely that the price of wheat is not determined by the retail price of bread. (393 F.Supp. at 982). Yet it is universally held that the value of wheat prior to harvesting is the market value of wheat less the cost of harvesting, an analogy closely in point since both unharvested wheat and commingled helium must be extracted or removed from extraneous materials in order to make either product marketable for beneficial use. See, *United States* v. *576.734 Acres of Land, etc.*, 143 F.2d 408, 409 (3rd Cir.); *International Harvester Company* v. *Kesey*, 507 S.W.2d 195 (Tex. S.Ct.); *Stafos* v. *Missouri Pacific Railroad Company*, 367 F.2d 314, 320 (10th Cir. Kan.).

The Kansas court did not find any comparable transactions which could establish market value, but rather based its value finding on an engineer's erroneous calculations relating to the economics of five totally different and noncomparable helium plants (393 F.Supp. at 984), ignoring that one of these, the Kerr-McGee plant, accounted to helium suppliers under a formula utilizing the workback method, for an average of $9.30 per m.c.f. of commingled helium, even though its unit costs of extraction were higher than the conservation plants.

to extract and market some of the elements as gas liquids. The gas liquids, once extracted and marketable as such, have the same competitive market value f.o.b. the extraction plant, no matter from which plant extracted. Yet the economics of each plant varies widely, because of the volumes of liquids available for extraction at that plant, the size of the plant, and other economic circumstances. For this reason, any such arrangement provides for the plant extractor to keep a percentage of the value after extraction for his expenses and profit, and a payment of the remainder to the producer-supplier. This results in the producer receiving, for commingled product value, from 90% down to as low as 10% of the value *after* extraction, in each instance depending upon the value after extraction, less the extraction costs and operator's profit.

This same basic method was used by the government to determine wellhead value of commingled helium. The Director of the Geological Survey himself referred to the above industry practice in determining the propriety of that method for valuing helium. (R. Ex. Vol. II, 298-299). This method was approved in *Navajo Tribe* v. *United States*, 364 F.2d 320, 176 Ct. Cl. 502 (federal law). It was also the method utilized, as adjusted upward in litigation, to determine value of helium supply to the private Kerr-McGee helium plant in Arizona.[12]

12. The United States was paid for helium from its lands on that valuation basis. (554 F.2d at 387). (The plant is now closed for lack of helium supply.)

The Director of the Geological Survey is extremely conversant with the extracted value-less-expense method, because he is required by law to collect royalties for components extracted from gas streams produced from federal lands on that basis. Validity of the federal method was upheld in *United States* v. *General Petroleum Corporation*, 73 F.Supp. 225, 254-257 (S.D. Calif.), affirmed, *Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir.).

(Continued on following page)

The practical rationale of this industry method is rooted in economic reality. Any one component of a gas stream may be worth very little if marketed as part of a natural gas stream. But if the component, such as helium, is considered worth extracting for a known market, and it is so extracted, it then has the value which has been established in that market. That market value, in turn, has no relationship to the value of the unextracted component when delivered for a totally different market as part of a gas stream. By allowing for the economic value of the extraction operation, the reasonable value of the product prior to extraction is readily ascertained.

The reason why market values for one component in a gas stream to be extracted do not develop is because supply conditions and other economic factors are variable, and differ from plant to plant. In the case of helium, the even more compelling reason was noted by the court of appeals, 554 F.2d at 386. There was no opportunity or freedom to negotiate or obtain any value for helium inasmuch as the helium extractors received the natural gas stream in return for payment of only FPC rates for the jurisdictional natural gas. Only litigation could determine the obligation, and the amount of liability, as the United States and the extraction companies themselves

Footnote continued—

The same basic federal valuation requirement is found today in 30 C.F.R. §221.51, which specifies a wellhead royalty on a minimum of one-third of the value of the extracted product, but proportionately more if extraction cost is less.

This federal law is, we presume, one reason why petitioner treats the question in a cursory manner, without citation of authority.

If state law applies, Texas law is clear in applying the same valuation method. *Mobil Oil Corporation* v. *Calvert*, 451 S.W.2d 889, 892 (Tex. S.Ct.); *Phillips Petroleum Co.* v. *Johnson*, 155 F.2d 185 (5th Cir. Tex.).

realized, in the price formula providing for such payment based on the anticipated litigation.

Petitioner makes the specious argument that the government created the value of helium it purchased, so it should not be required to pay for it. This argument, initially raised below, but apparently abandoned on the *rehearing en banc,* is effectively answered by the court of appeals:

> ". . . The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value." (554 F.2d at 388, 389).

The government, since 1961, has sold helium commercially for $35.00 per mc.f. f.o.b. extraction plants. Since then, private extractors have built plants at locations where the government once anticipated expanding its conservation program. A temporary surplus helium production capacity occurred for this reason, so that competitive helium market values during 1963-1972 ranged from $35.00 to $20.00 per m.c.f. This temporarily depressed price will soon vanish as helium supply for private plants is depleted, but the government will wisely have acquired the helium during that time period.

Contrary to any other government stockpiling of a commercial product, the government seeks to obtain helium for far less than prices commensurate with its market

value. This was, indeed, the position of the Interior Department from the very beginning, but its position was overruled by Congress, and its position is contrary to the settled law upon this subject. The entire helium conservation program, of course, involves millions of dollars in liability, because millions of m.c.f.'s (one thousand cubic feet) of helium were obtained by the government, over a ten-year period, from tens of thousands of royalty owners and many hundreds of producers. Nevertheless, petitioner, and the dissent below, have greatly exaggerated what is at stake.[13]

The commercial nature of the government's acquisition is also demonstrated by the fact that the government will sell all this helium for more than enough to pay all acquisition costs, plus interest, at no cost to the taxpayers. Even now, private parties are storing huge quantities of helium for their own account for future sale, proving beyond question the commercial nature of the stockpiling program.

The valuation issue is undoubtedly a factual question (554 F.2d 385), subject to appropriate legal standards. The legal standards applied in this case were fully supported by the evidence, in accordance with a long line of federal and state cases. Review by this Court is unwarranted and could only serve to delay these already prolonged, interminable proceedings.

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13. The 36,500,000 m.c.f.'s of stored helium referred to is the total stored not only under the conservation contracts, but by the government from its own plants, and by private parties for their own accounts. Additionally, all helium from the conservation helium extractors which they or their affiliates produce is not subject to any claims by producers. The actual amount in litigation approximates 20,000,000 m.c.f.'s of helium.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a), (b), & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.